LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
JUL 13 1971
E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-74

HAROLD F. CONELL,
Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

WAYNE G. PATTON
HIRAM W. WATKINS
130 South Bemiston Avenue
Clayton, Missouri 63105
Attorneys for Petitioner

St. Louis Law Printing Co., Inc., 411-15 N. Eighth St. 63101 314-231-4477

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	3
Statement of facts	3
Conclusion	15
Appendix (8th Circuit Opinion)	A-1

Table of Cases Cited

Grant v. United States, 9 Cir., 291 F. 2d 746, cert. den. 368 U.S. 999, 82 S. Ct. 627, 7 L. Ed. 2d 537 11

Morei v. United States, 6th Cir., 127 F. 2d 827, 836 .. 12

Nye and Nissen v. United States, 336 U.S. 613, 669 S. Ct. 766, 93 L. Ed. 919 (1949) 10, 12, 13

Pereria v. United States, 347 U.S. 1 (1954) 12, 13

Rizzo v. United States, 275 F. 51 (3d Cir. 1921) 11, 13

Roth v. United States, 10 Cir., 339 F. 2d 863, 865 11

United States v. Garguilo, 310 F. 2d 249, 253 (2d Cir., 1962) 12

United States v. Peoni, 100 F. 2d 401, 402 (2nd Cir. 1938) 10, 13

United States v. Turnipseed, 272 F. 2d 106 (1959) ..11, 13

United States v. Williams, 341 U.S. 58, 71 S. Ct. 595, 95 L. Ed. 747 .....11, 12

U.S. v. Crosby, 294 F. 2d 928 (1961); Cert. Den. 368 U.S. 984, 7 L. Ed. 2d 523, 82 S. Ct. 599, re-hearing den. 369 U.S. 881, 8 L. Ed. 2d 285, 82 S. Ct. 1138 ....8, 13

White v. United States, 366 F. 2d 474 (1966) 11, 13

Miscellaneous Cited

15 U.S.C. § 77a 3

15 U.S.C. § 77g(a) 2, 3

15 U.S.C. § 77e(a)(2) 2, 3, 4

18 U.S.C. § 2 .....2, 3, 10

18 U.S.C. § 5(a)(2) 2

18 U.S.C. § 550 10

18 U.S.C. § 1341 ..... 2, 3

28 U.S.C. § 1254(1) 2

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. .....

HAROLD F. CONELL,
Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

Harold F. Conell, your Petitioner, respectfully prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above entitled cause on June 14, 1971.

OPINIONS BELOW

This cause was decided by a panel of the United States Court of Appeals on June 14, 1971 in an opinion which has not yet been officially reported. The opinion is reproduced as Appendix A hereto.

Trial in the District Court was by jury.

Fifteen Counts were submitted to the jury. Seven of these were based on alleged violation of 18 U.S.C. § 1341 (mail fraud), seven were based on alleged violation of 15 U.S.C. § 77g(a) (securities fraud) and one on alleged violation of 15 U.S.C. § 77e(a)(2) (use of the mails for sale or delivery of an unregistered security). Your Petitioner, Harold F. Conell was found innocent of all fraud charges, but a verdict of guilty was returned against him for the alleged violation of 15 U.S.C. § 77e(a)(2). A proper post trial motion was filed in the District Court by your Petitioner, which motion was overruled. No opinion was written by District Judge Roy Harper.

JURISDICTION

The judgment of the United States Court of Appeals was entered on June 14, 1971.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

The broader question presented is the effect of 18 U.S.C. § 2 (often called the Aider and Abettor Statute) in conjunction with § 5(a)(2) of the Securities Act of 1933 (placing an unregistered security in the mail) which question has never been firmly decided by this Court.

The precise question presented is whether the evidence in this case supports a conviction of your Petitioner for violation of § 5(a)(2) of the Securities Act of 1933 (15 U.S.C. § 77e(a)(2) in a situation in which the Government must rely completely on the Aider and Abettor Statute for Petitioner took no part in any activity as to the particular promissory note (security) involved, and had no knowledge of the particular transaction for which he was indicted.

STATUTES INVOLVED

18 U.S.C. § 2:

> "a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal. b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

15 U.S.C. § 77e(a)(2):

> "Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly . . . to carry or cause to be carried through the mails . . . any security for the purpose of sale or for delivery after the sale."

15 U.S.C. § 77x:

> "Any person who willfully violates any of the provisions of this sub-chapter . . . shall upon conviction be fined not more than $5000.00 or imprisonment of not more than five years, or both."

STATEMENT OF FACTS

Your Petitioner, Harold F. Conell, together with Donald P. Smallwood and Roy E. Lay were indicted on ten counts of violation of 15 U.S.C. §77a (sometimes referred to as securities fraud), ten counts of violation of 18 U.S.C. §1341 (sometimes referred to as mail fraud), and one violation of 15 U.S.C. §77e(a)(2) (using the mails to sell or deliver an unregistered security). During the trial, which was a jury trial, the Government dismissed three counts of securities fraud and three counts of mail fraud. The remaining counts were submitted.

The charges were an outgrowth of an operation of Diversified Brokers, Inc., a Missouri corporation, which was chartered on November 12, 1965. Your Petitioner was an employee of that company.

On trial of the matter, the jury found your Petitioner not guilty on all counts submitted to them concerning securities fraud and mail fraud, but found your Petitioner guilty of knowingly and willfully placing an unregistered security in the mail for purpose of sale and delivery after the sale. Messrs. Smallwood and Lay were found guilty on all counts submitted to the jury. Harold Conell was given the maximum sentence permitted under the Act: five years imprisonment and a fine of $5,000.00, from which Petitioner appealed to the Eighth Circuit Court of Appeals.

The Government basically conceded on the post trial motion in the District Court and again in the Eighth Circuit Court of Appeals that no submissible case was made against Petitioner except under the terms of the Aider and Abettor Statute. This, at least inferentially if not directly, appears to be the holding of the Eighth Circuit Court of Appeals. A review of the evidence clearly shows that no submissible case was made directly under the terms of 15 U.S.C. §77e(a)(2).

The applicable portion of Count 21 of the Indictment reads:

> 2. On or about the 30th day of January, 1968, in the Eastern District of Missouri, and within the jurisdiction of this Court, the defendants, Donald P. Smallwood, Roy E. Lay, and Harold F. Conell, knowingly and willfully, placed and caused to be placed in an authorized depository for mail matter the aforesaid security, a Diversified Broker promissory note dated January 18, 1968, issued to Sharron and/or Delores

Fowler in the amount of $9,200.00, to be delivered by the United States mail to Sharron Fowler, 3100 Martha Bell, Apt. H, Belleville, Illinois 62221. In violation of §77e(a)(2), Title 15, United States Code.

The promissory note here involved (Government's Exhibit No. 2) was dated January 18, 1968, was payable to Sharron and/or Delores Fowler, was signed by Donald P. Smallwood for Diversified Brokers, Inc., as maker, and was for the period of one year. The face amount of the note was for $9,200.00.

The testimony concerning this note is relatively short considering the length of the trial and comes from only two witnesses, Sharron Fowler and Donald P. Smallwood. The testimony of Mr. Fowler (R. 181-189) is summarized as follows: In October 1966, Mr. Fowler met with Mr. Smallwood at the offices of Diversified Brokers pursuant to a telephone call Fowler made to Smallwood. Fowler was not solicited by anyone from Diversified Brokers, but had heard of Diversified Brokers through someone else who was not identified. Fowler talked to no one other than Mr. Smallwood, following which Mr. Fowler loaned One Thousand Dollars to Diversified Brokers, for which he received a promissory note. The note was signed by Mr. Smallwood. The money was paid by Fowler's personal check which was given to Mr. Smallwood.

In January of 1967, Fowler, accompanied by his wife, returned to the office of Diversified Brokers and again talked to Mr. Smallwood. This was apparently on or about the due date of the initial One Thousand Dollar note. At that time, Mr. Fowler again spoke only with Mr. Smallwood. Fowler indicated that he wished to "reinvest" the one thousand dollars plus the two hundred dollars interest that had accrued on the note, and also loaned an additional amount of Eight Thousand Dollars to Diversified,

making a total loan of ninety two hundred dollars. The note was also signed by Mr. Smallwood.

Government's Exhibit No. 2 was erroneously identified by the witness as having been received by him at that time, that is in January 1967 (R. 187). Government's Exhibit No. 2 is dated January 18, 1968, and rather obviously it could not have been on the occasion in January 1967, that the note was made and issued.

Just how Government's Exhibit No. 2 came into existence is never explained in the record.

However, we are told by Mr. Fowler that he received payment of $9,200.00 from Diversified Brokers, when Fowler returned to the offices of Diversified Brokers a year later (R. 183 and 188), that is in January 1968, and that he talked only with Mr. Smallwood on that occasion. Whether arrangements were made during this visit for the Fowlers to receive the note marked Government's Exhibit No. 2 is pure conjecture. Mr. Fowler did state he received this note through the mail in January, 1968, and this plus what appears on the note itself is all the record shows.

However, there is this further important testimony from Mr. Fowler (R. 189):

> "Q. Mr. Fowler, at no time did you have any dealings with Harold Conell, did you?
>
> A. No.
>
> Q. Did you know him at all?
>
> A. No.
>
> Q. Never spoke to him concerning Diversified?
>
> A. No."

Donald Smallwood's testimony in regard to the note is only incidental to the questions here raised, for Mr. Smallwood's testimony is only to the effect that he recalled

talking with Mr. Fowler and that the promissory note (Government's Exhibit No. 2) was for less than one year (R. 396, 421, 432, 435). Thus the only testimony pertinent to the note came from Sharron Fowler. Mrs. Fowler did not testify.

There is no evidence concerning the physical mailing of the note.

Also, there is the following evidence which may be relevant to the issues here. Diversified Brokers, Inc., was in the business of buying and selling distressed and surplus merchandise, or so Petitioner and the general public was told. Petitioner Harold Conell was not an incorporator of Diversified. At no time did he hold any stock in the company. He was never a director of the company. He did not attend any stockholders' or directors' meeting (Government Exhibit 102—The Minute Book). Petitioner could not and did not sign checks. Although he was told by officers of Diversified that he was the executive secretary, the books and records of the company show that he was not. Although he was listed as treasurer of the company on some of the records, he was unaware of this until it was reported in the newspapers. His salary which started as $125.00 per week and was eventually raised to $200.00 a week, was set by others. He did not buy or sell merchandise and was not authorized to do so. The books and records of the company were not available to him. He knew nothing of the "business" operations of the company. He had no interest in the profits of the company.

He was not asked to, nor did he attend any meeting or meetings with the S.E.C. representatives which were held in 1966. (According to both Smallwood and the company attorney, the question of registration was not brought up at the meeting.) He was told after the meetings by Mr. Smallwood, that the promissory notes were not securities

within the meaning of the Act (R. 481) and was assured that everything was all right.

He was never contacted by or had any discussions with the company's attorneys until a receiver was appointed by the Court in February, 1969. He was never contacted by S.E.C. representatives. Harold Conell was hired by Diversified at a weekly salary to raise funds for Diversified Brokers, primarily through ministers and church contacts.

The Indictment is very specific as to the crime charged, namely using the mails to deliver a promissory note of Diversified Brokers, Inc., which note was signed by Donald P. Smallwood on behalf of the corporation, to one Sharron Fowler. In its brief in the Eighth Circuit Court of Appeals, the Government conceded: "There is no doubt that the Government's evidence did not show any direct connection between Fowler and Lay and Conell", but contended that a submissible case was made on the theory that Petitioner aided and abetted in the commission of the crime charged. Since there seems to be little doubt that the Government did fail to make a case under any other theory, Petitioner will limit his argument to question presented by the aider and abettor statute.

The difficulty in this type of case is succinctly set forth in the Second Court of Appeals opinion in **U.S. v. Crosby**, 294 F. 2d 928 (1961), Cert. Den. 368 U.S. 984, 7 L. Ed. 2d 523, 82 S. Ct. 599, re-hearing den. 369 U.S. 881, 8 L. Ed. 2d 285, 82 S. Ct. 1138 in which the Court stated:

> "Because of the tremendous potential for collateral prejudice inherent in these cases, however, the Courts must be extremely scrupulous in sorting out the evidence against single defendants and weighing the same—divorced from the all too often damning influence of the background conspiracy.

> The case against these three defendants presents a peculiarly difficult problem in this regard because the prime issue is one of guilty knowledge and criminal intent. It is undisputed that the brokers' acts in fact furthered the conspiracy; the claim is persuasively made, however, that they were merely 'doing business as usual' and, to their best knowledge, according to acceptable standards of that business. The statutory and administrative regulatory scheme over this area is far from a model of clarity; such a situation is aggravated when, as here, criminal liability is based on failure to comply with the law . . . The scanty extrinsic evidence against the defendants implies guilt only if we first assume guilty knowledge and purposes; when used to prove that basic element of the crime it is neither substantial nor convincing."

These words seem particularly applicable in this instance when there were many days of testimony concerning a background "fraudulent scheme" and the effect of that scheme upon persons who lent money to Diversified Brokers.

While Petitioner may have (although unknowingly and without criminal intent, according to the jury) assisted in the operation of Diversified Brokers, Inc., which operation the jury found to be illegal, he was not accused nor convicted of "aiding and abetting" the operation of that corporation. He was accused of a very specific crime involving a very specific promissory note.

The question, then, is whether he in some way willfully assisted in connection with the Fowler transaction.

Under the evidence, to ask that question is to virtually answer it, for the evidence conclusively shows that Petitioner had no knowledge of the Fowler transaction.

Although it is difficult to separate the legal concepts of participation in a scheme from "aiding and abetting", it

appears under the decided cases, that to aid and abet the perpetration of the crime requires something more substantive, something less elusive, than participation in a scheme which may require very little in the way of an overt act.

Perhaps the most oft quoted case in this area is **Nye and Nissen v. United States**, 336 U.S. 613, 669 S. Ct. 766, 93 L. Ed 919 (1949), which in turn quotes Judge Learned Hand in **United States v. Peoni**, 100 F. 2d 401, 402 (2nd Cir. 1938): "In order to aid and abet another to commit a crime it is necessary that a defendant in some sort associate himself with the venture, that he participate in it as in something he wishes to bring about, that he seek by his action to make it succeed." This has largely been adopted as the "touch stone," in virtually all cases presenting questions under 18 U.S.C. § 2. The facts and ruling in that "root" case make it clear that the "abetting" is limited to the specific criminal act charged—not to assisting or taking part in the overall plot or plan.

In the Peoni case, supra, after reviewing the history of the aider and abettor statute, Judge Hand concluded at 402, that "all the words used—even the most colorless, 'abet'—carry an implication of purportive attitude toward it."

There Peoni sold counterfeit money to one Regno who in turn sold it to one Dorsey who in turn was arrested while attempting to pass it. Peoni was indicted and convicted of the charge of violation of 18 U.S.C. § 550 (now 18 U.S.C. § 2(a)) in aiding and abetting Dorsey's possession of counterfeit money. Judge Hand held, however, in reversing the conviction, that Peoni's utterance of the forged bills was only one step in the causal chain that ended with Dorsey's possession of the bills, and as he did not participate in the sale of the counterfeit money to Dorsey, Peoni could not be convicted of aiding and abetting Dorsey's possession. Clearly Peoni had some part in the overall situation, but

this was not the charge. So, too, it is here, for Petitioner had some relationship with Diversified Brokers, but again that is not the crime charged.

The same view was taken by the Tenth Circuit Court of Appeals in **White v. United States**, 366 F. 2d 474 (1966) in which the aider and abettor statute was presented against a Dyer Act background. At page 476 the Court states:

> "Aiding and abetting, as used in the Statute, means to assist the perpetrator of a crime. **United States v. Williams**, 341 U.S. 58, 71 S. Ct. 595, 95 L. Ed 747. As this Court said in **Roth v. United States**, 10 Cir., 339 F. 2d 863, 865, 'To be an aider and abettor requires that a defendant associate himself with **the venture** (emphasis ours), that he participate in it as in something he wishes to bring about, that he seek by his action to make succeed.' . . . Aiding and abetting implies guilty knowledge. **Grant v. United States**, 9 Cir., 291 F. 2d 746, cert. den. 368 U.S. 999, 82 S. Ct. 627, 7 L. Ed 2d 537."

Knowledge that a crime is to be committed is also a prerequisite to conviction under the aider and abettor statute. In **Rizzo v. United States**, 275 F. 51 (3d Cir. 1921), defendant was accused of aiding and abetting a violation of the white slavery act. The evidence showed conclusively that the women involved were already across the state line before Rizzo took them into his home to ply their trade. Rizzo knew nothing about the transportation. The Court reversed the conviction stating, at page 52:

> "As the offense was complete before Rizzo knew of it and before he did the act charged to have been in aid of it, it followed that he could not be legally convicted of knowingly aiding and abetting its perpretation."

The Seventh Circuit substantially agreed in **United States v. Turnipseed**, 272 F. 2d 106 (1959):

"In order to aid and abet the commission of a crime it is necessary that the supposed aider and abettor act with knowledge that an offense is to be committed. **Morei v. United States**, 6th Cir., 127 F. 2d 827, 836."

There defendant was accused of unlawful possession and uttering of a Government check which had been stolen and on which payee's name had been forged. Defendant was the driver of a car which took co-defendant to a place where co-defendant atttempted to cash it. In the opinion it was pointed out that the Appellant did not have possession of the check, that there was no evidence that he had forged the endorsement nor was there any evidence of his knowledge of the check.

In this case, as previously noted, defendant may well have assisted in the operation of Diversified Brokers, Inc., although without knowledge of its illegal operation, but there was absolutely no evidence to show that he had any connection, directly or indirectly, with the Fowler transaction, and in fact no evidence to show that he had any knowledge that this particular note was ever in existence.

Even had he been possessed of sufficient knowledge, that in itself would not have been enough to sustain a conviction. As stated in **United States v. Garguilo**, 310 F. 2d 249, 253 (2d Cir., 1962), "But knowledge that a crime is being committed, even when coupled with presence at the scene, is generally not enough to constitute aiding and abetting."

In **Nye and Nissen v. United States**, supra, the aider and abettor statute was construed against a background of defrauding the Government in connection with the sale of supplies. In **United States v. Williams**, supra, the question arose against a background of perjury concerning civil rights. In **Pereria v. United States**, 347 U.S. 1 (1954), the aider and abettor statute was brought into play

against the background of what perhaps can best be described as fraud by marriage, which incidentally involved the victim furnishing the accused with a check for $35,000.00 which eventually passed through the mail. In that case the Court stated at pages 8 and 9:

> "Where one **does an act** with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he 'causes' the mails to be used." (*Emphasis ours.*)

None of these cases decide the effect of the aider and abettor statute in a security violation situation, but they do seem to set out the general applicability of that statute to criminal violations. These can be summarized so as to require the Government to show, in order to invoke the aider and abettor statute, that:

1. The defendant knew that an illegal act was to be committed before it was in fact committed. **Nye and Nissen v. United States**, supra, **United States v. Peoni**, supra, **Rizzo v. United States**, supra.

2. The defendant participated in **the act** itself so as to make it succeed. **Nye and Nissen v. United States**, supra, **Pereria v. United States**, supra, **White v. United States**, supra, **U. S. v. Crosby**, supra.

3. The defendant had guilty knowledge concerning the act. **White v. United States**, supra, **United States v. Turnipseed**, supra, **United States v. Peoni**, supra.

Assuming that these rules are applicable where the substantive crime of which the defendant is accused is a violation of the security act as they are in other situations, it is apparent that the Government failed to prove any of the requirements.

Taking these in the order set out above, there is no testimony or evidence whatsoever that your Petitioner

knew anything at all concerning the Fowler transaction at any time prior to trial. Accordingly, the proof failed as to the first requirement under the decided case law.

In regard to the second requirement, there was no evidence whatsoever that your Petitioner participated in the specific act charged, namely in connection with the sale or delivery of the Fowler note. All the evidence, which is principally Mr. Fowler's testimony, is completely to the contrary. Thus the Government failed to meet its burden as to its second requirement for conviction.

Lastly, the Government failed to show that your Petitioner had any "guilty knowledge" concerning the act alleged. It seems axiomatic that if your Petitioner knew nothing of the act itself, he could have no "guilty knowledge" of it. As corollary thereto, the evidence also shows that the S.E.C. had not advised Petitioner that any of the notes issued by Diversified Brokers, Inc., were securities requiring registration. Although there had been some discussions between the S.E.C. representatives and Donald Smallwood, President of Diversified Brokers, Inc., Petitioner was not present. Even in those discussions, according to the evidence, there was never any conversation concerning the necessity for registration. The attorney for Diversified Brokers, Inc. did not advise your Petitioner of the necessity of registration, the testimony of the attorney being that he had never met your Petitioner until after the S.E.C. obtain an injunction closing Diversified Brokers' operation. At some point your Petitioner learned that there had been a meeting between an S.E.C. representative, the attorney for the company, and Mr. Smallwood, and upon inquiry to Mr. Smallwood concerning that meeting was assured that "everything is all right".

This being all the evidence in connection with "guilty knowledge", the Government's proof failed completely on

this point. Thus the proof completely failed as to all requirements for conviction under the aider and abettor statute.

We respectfully submit that the Court of Appeals erroneously decided this cause in a way that is in conflict with the decisions of this Court and the decisions of other Courts of Appeal as to application of 18 U.S.C., §2, and that if the Court of Appeals properly applied the general rules concerning that section, the conviction would be reversed.

CONCLUSION

For these reasons, it is respectfully submitted that this Petition for Certiorari should be granted and respectfully submitted.

WAYNE G. PATTON and

HIRAM W. WATKINS
130 South Bemiston Avenue
Clayton, Missouri 63105
Attorneys for Petitioner

APPENDIX

United States Court of Appeals
For the Eighth Circuit

No. 20,000

United States of America,
Appellee,

v.

Donald P. Smallwood, Appellant.

No. 20,001

United States of America,
Appellee,

v.

Roy E. Lay, Appellant.

No. 20,010

United States of America,
Appellee,

v.

Harold F. Conell, Appellant.

Appeals from the United States District Court for the Eastern District of Missouri.

[June 14, 1971.]

Before MATTHES, Chief Judge, GIBSON, Circuit Judge, and HENLEY, District Judge.*

* Chief Judge, United States District Court, Eastern District of Arkansas, sitting by designation.

MATTHES, Chief Judge.

These appeals stem from judgments of conviction entered upon jury verdicts in the United States District Court for the Eastern District of Missouri. Appellants Smallwood and Lay were found guilty on all 15 counts submitted to the jury—seven counts of securities fraud in violation of 15 U.S.C. § 77 g(a), seven counts of mail fraud in violation of 18 U.S.C. § 1341, and one count of mailing an unregistered security in violation of 15 U.S.C. § 77e(a)(2). Appellant Conell was found guilty only of the count charging a violation of 15 U.S.C. § 77e(a)(2).[1]

The illicit activities which formed the basis for these convictions took place from 1965 to 1969. In November of 1965, Diversified Brokers Company was incorporated under the laws of the State of Missouri by appellant Smallwood, his wife, and appellant Lay, all of whom were also shown by the corporate records to be the shareholders and directors of the company. Smallwood was the President of Diversified, Lay the Vice President and Secretary. Minutes of an annual meeting of the Board of Directors in November of 1967 show that Conell was at that time elected Treasurer of the corporation.

The basis of the fraudulent scheme engaged in consisted of selling promissory notes to investors for cash received. The sales were induced by representing to prospective investors that they would receive exorbitant rates of return on these investments ranging up to 100% interest per annum. In addition to promising to pay these unusually high rates of interest, appellants also induced persons to loan money to Diversified by misleading and false representations including statements that each investment was assigned to a specific "project" identified

---

[1] All three appellants were originally indicted in 21 counts. At the close of its case, the government withdrew Counts 2, 5, 7, 18, 19 and 20 as to all appellants.

by number, that the business projects engaged in consisted of buying and reselling government surplus and distressed merchandise at huge profits, when, in fact, the amount of Diversified's business in distressed merchandise was infinitesimal compared to the total sum received from investors. Instead of using the funds so obtained to purchase surplus merchandise for resale, large sums were wrongfully and unlawfully diverted to purchase personal property consisting of jewelry, objects of art, luxury automobiles and expensive yachts which were taken possession of in large part by appellants Smallwood and Lay.[2] The result was inevitable—the company was operated at a substantial loss each year. The record shows that literally thousands of persons from a number of states loaned millions of dollars to Diversified under the impression that the company operated a highly profitable and legitimate business. As might be expected, many of the investors were those persons most likely to succumb to appellants' misrepresentations—clergy and active members of religious organizations, elderly persons investing life savings in the venture, laborers, and generally those elements of society unsophisticated in the ways and means of financial enterprise. While it is difficult to determine the amount that will eventually be restored to the investors, for the reason that the assets recovered by the receiver are now being liquidated in bankruptcy proceedings, it is apparent that a substantial over-all loss will be sustained.

Appellants Smallwood and Lay have consolidated their assignments of error on appeal. They do not contest the sufficiency of the evidence to support the jury verdict except as to Count Twenty-one which charged the mailing

---

[2] By way of example, the record shows that appellants Smallwood and Lay purchased at retail $263,639.63 in jewelry and diamonds from one jewelry store, and that appellant Smallwood made purchases at retail of $884,239.89 in antiques, objects of art and jewelry at the Four Seasons Antique Shop.

of an unregistered security. In addition, they assert that the trial court erred: (1) in overruling their second supplemental motion to suppress evidence; (2) in admitting into evidence certain government exhibits; (3) in overruling their motion for a bill of particulars; (4) in imposing the punishments assessed. As seen below, appellant Conell limits his assignment of error on appeal to issues which relate to the sufficiency of the evidence to support his conviction on the charge of mailing an unregistered security. Each of these contentions will be considered seriatim.

MOTION TO SUPPRESS

In their second supplemental motion, appellants Smallwood and Lay sought to suppress from evidence Grand Jury Exhibits Nos. 10 and 11 consisting of 20 files of documents, including invoices and sales contracts evidencing purchases of automobiles, boats, real estate, insurance policies, diamonds and contracts for the painting of a home and installation of a burglar alarm system.

On February 17, 1969, the Securities and Exchange Commission filed a complaint in the United States District Court, Eastern District, Missouri (Civil Action No. 69C57(2)) against Diversified Brokers Company and appellants charging violations of the Securities Act of 1933. On February 27, 1969, Diversified and all three appellants consented to a final judgment enjoining and restraining Diversified from violating the Securities Act and to the appointment of a receiver to take charge of all the assets and property of Diversified. After his appointment, the receiver took possession of the corporate offices and their contents and also obtained numerous files and records from the offices of Satz and Ponfil, attorneys for Diversified. On March 19, 1969, the receiver was served with a subpoena to appear before the Grand Jury and to bring

all the records of Diversified. Pursuant to that subpoena, the records which appellants sought to suppress in their second supplemental motion were turned over to agents of the government.

In the district court, appellants alleged that Grand Jury Exhibits Nos. 10 and 11 consisted of personal, not corporate, records, and that they therefore had standing to challenge the admissibility of these records into evidence on the ground that they were obtained as the result of an unlawful search and seizure. Alternatively, appellants maintained that even if the records were corporate, they still had standing to object to the search and seizure under the doctrine of *Mancusi* v. *DeForte*, 392 U.S. 364 (1968).

Assuming they had such standing, appellants contended that the search and seizure was unreasonable because made without a warrant and without their consent. This argument was premised upon the theory that attorneys Satz and Ponfil who voluntarily turned over many of the files to the receiver, could not validly consent to or waive appellants' right to contest the search and seizure.

After an evidentiary hearing, the district court denied appellants' motion, finding that the records sought to be suppressed were corporate records[3] and holding that appellants had no standing to attack their search and seizure and that the records were properly obtained. In asserting that the district court erred, appellants rely upon the same arguments presented in support of their motion in the trial court.

We find no merit in appellants' contention that these records were personal. Appellants offered absolutely no evidence to support their allegation that the papers in question were their personal files. On the contrary, the

---

[3] The motion was granted as to File No. 5, consisting of an invoice and title application on a 1968 Cadillac Fleetwood on the basis that this was a personal record.

government presented the testimony of an accountant for the Securities and Exchange Commission who tied in all of the documents in question with the corporate records which clearly showed that the files referred to were property of Diversified Brokers Company.

We next consider whether appellants nevertheless had standing to object to the search and seizure of these corporate records. Appellants rely heavily upon the Supreme Court's holding in *Mancusi* v. *DeForte*, supra, which involved the seizure of records from an office shared by the defendant and other union officials. Even though the papers seized were union records and not personal records, the Supreme Court found that the defendant had standing to object to the search of his office and the seizure of these records. However, the facts upon which the Supreme Court premised its holding in *Mancusi* differed substantially from those in the case before us. First, in *Mancusi*, the union official was legitimately on the premises when state officers conducted the search and seizure. See *Jones* v. *United States*, 362 U.S. 257 (1960). Moreover, it was stipulated by the parties that the official had custody of the papers at the moment of their seizure. *Mancusi* v. *DeForte*, supra at 368-69.

In the case before us, the records were obtained by government agents pursuant to a Grand Jury subpoena directed toward the court-appointed receiver for Diversified. At the moment the files in question were turned over, the receiver had actual, lawful custody of the records, and appellants were not, nor did they have a right to be, present either when the records were turned over in compliance with the subpoena or when the receiver initially took possession of the files at the corporate offices of Diversified and at the offices of Satz and Ponfil.

Secondly, the records seized in the *Mancusi* case were union records, and were taken as the result of a physical

search. It has long been the established rule that corporate records may be subpoenaed and that the privilege of the Fourth Amendment is not available to a corporate officer to prevent the use of these records against him. *Wilson* v. *United States*, 221 U.S. 361 (1911); *Fineberg* v. *United States*, 393 F.2d 417 (9th Cir. 1968); *Galbraith* v. *United States*, 387 F.2d 617 (10th Cir. 1968); *United States* v. *Fago*, 319 F.2d 791 (2d Cir.), cert. denied 375 U.S. 906 (1963). In this regard, it is significant that the Court in *Mancusi* specifically noted that the earlier Supreme Court decision in *Wilson*, supra, was not contrary to its holding because *Wilson*, like the matter presently before us, involved no physical search but rather the obtaining of corporate records pursuant to a subpoena duces tecum. *Mancusi* v. *DeForte*, supra at 367, n. 4.

Finally, in *Mancusi*, the Court emphasized that the union official could reasonably have expected not to be disturbed in his private office except by personal or business invitees and that records contained in that office would not be touched without his consent. In other words, the area was one in which there was a reasonable expectation of freedom from governmental intrusion. See *Katz* v. *United States*, 389 U.S. 347 (1967). In the case before us, a receiver was appointed by the district court upon the petition of the Securities and Exchange Commission in which it was specifically charged that Diversified and appellants were engaging in practices which constituted violations of the Securities Act of 1933, and upon the further allegation that appointment of a receiver was necessary to conserve the assets of the corporation to protect its investors. A receiver is an officer of the court. *Powell* v. *Maryland Trust Co.*, 125 F.2d 260, 271 (4th Cir.), cert. denied 316 U.S. 671 (1942). He is not an agent or employee of either party to the litigation in which he was appointed. *Bowersock Mills & Power Co.* v. *Joyce*, 101 F.2d 1000, 1002 (8th Cir. 1939); *Phelan* v. *Middle States*

Oil Corp., 154 F.2d 978, 991 (2d Cir. 1946). In *Kroll* v. *United States*, 433 F.2d 1282 (5th Cir. 1970), the court was presented with a search issue nearly identical to that in the case before us. The court held that the defendant, the sole stockholder and president of a corporation petitioned into bankruptcy, had no standing to attack a search of corporate records conducted after a trustee had been appointed and had taken possession of the premises and records of the company. In finding that the defendant could not reasonably expect freedom from governmental intrusion once the trustee was appointed, the court noted:

> "We think it significant that the trustee is under a duty to report to the United States Attorney any probable criminal violations of the bankruptcy act and to disclose to that official all relevant information. Title 18, U.S.C., Section 3057. In light of the strong governmental interest in protecting creditors in a bankruptcy situation a bankrupt would indeed be shortsighted if he did not perceive that many interested parties, governmental or otherwise, might be interested in examining the books of the bankrupt business. Reasonable expectations are that government officials will be examining the books."

Id. at 1289. Section 3057, Title 18, U.S.C. places a like duty upon a court-appointed receiver. Moreover, under the circumstances of this case it would have been completely unrealistic for appellants not to anticipate that government agents would be interested in examining the corporate records of Diversified.

For all reasons discussed herein, we find that appellants Smallwood and Lay did not have standing to object to the seizure of these corporate records and that the district court did not err in denying the second supplemental motion to suppress. Accordingly, it is unnecessary to discuss the further contention of appellants that attorneys Satz and Ponfil could not validly consent to the turning over to the receiver of those files of Diversified

which were in their possession, as any objection on this ground is necessarily dependent upon their standing to object to the seizure.

ADMISSION OF EXHIBITS

Appellants Smallwood and Lay assert that the trial court erred in admitting into evidence over their objections certain government exhibits which were introduced for the purpose of showing the financial condition of Diversified. Appellants premise their objection to the use of these exhibits on the basis that they were not shown to be accurate.

We have carefully examined the evidence pertinent to the admission of these materials and find no merit to appellants' assertion of prejudicial error. The exhibits referred to were either themselves the actual records of the company or were summaries of actual records already in evidence. These exhibits were introduced by the government through the testimony of witnesses who had personally prepared these documents. The witnesses were subjected to thorough cross-examination by the defense, and the small percentage of error or the possibility of any inaccuracy in the exhibits was fully developed before the jury. Moreover, the trial court was careful to instruct the jury that the summaries were not evidence as such, but were only for their assistance in considering the evidence which they purported to summarize.

The court room use of summaries of business records, particularly where the actual records are voluminous or complex, is not only proper, but advisable. *Boston Securities, Inc.* v. *United Bonding Insurance Co.*, ... F.2d ... (8th Cir., May 10, 1971); *Peter Kiewit Sons' Co.* v. *Summit Constr. Co.*, 422 F.2d 242, 267 (8th Cir. 1969). Evidential use of such summaries rests within the sound discretion of the trial judge, whose action in allowing

their use may not be disturbed by an appellate court except for an abuse of discretion. *United States* v. *Brickey*, 426 F.2d 680, 686-687 (8th Cir. 1970), cert. denied 400 U.S. 828 (1970); *Koolish* v. *United States*, 340 F.2d 513, 533 (8th Cir.), cert. denied 381 U.S. 951 (1965); *Frumento* v. *United States*, 277 F.2d 511, 515 (8th Cir.), cert. denied 364 U.S. 828 (1960). The claimed error in the accuracy of the summaries was fully presented to the jury, and in our view the relatively few inaccuracies went to the weight of the evidence and not its admissibility. See *Elbel* v. *United States*, 364 F.2d 127, 139 (10th Cir.), cert. denied 385 U.S. 1014 (1967); *Hedrick* v. *United States*, 357 F.2d 121, 123 (10th Cir. 1966); *McDaniel* v. *United States*, 343 F.2d 785, 789 (5th Cir.), cert. denied 382 U.S. 826 (1965).

BILL OF PARTICULARS

Appellants Smallwood and Lay allege that the trial court erred in overruling their joint motion for a Bill of Particulars in which they sought an explanation of the term "accumulated loss" as used in Count I of the indictment.

In considering this assertion of error, we bear in mind that motions for bills of particulars are addressed to the sound discretion of the trial judge whose ruling will not be disturbed on appeal except for a clear abuse of discretion. *Wong Tai* v. *United States*, 273 U.S. 77, 82 (1927); *Ross* v. *United States*, 374 F.2d 97, 103 (8th Cir.), cert. denied 389 U.S. 882 (1967); *Ray* v. *United States*, 367 F.2d 258, 263 n.5 (8th Cir. 1966), cert. denied 386 U.S. 913 (1967). We find no abuse of discretion in the district court's denial of the motion. That part of the indictment to which appellants refer specifically charged that as a part of the over-all scheme to defraud investors appellants concealed that as of September 30, 1968, Diversified Brokers had an accumulated loss of at least $1,800,000.

This charge was sufficiently definite and certain to safeguard appellants' rights and to enable them to prepare their defense. The further explanation sought by appellants would have involved the disclosure of evidentiary detail which the government intended to present at trial, and this is not the function of a bill of particulars. *Hemphill* v. *United States*, 392 F.2d 45, 49 (8th Cir.), cert. denied 393 U.S. 877 (1968); *Ray* v. *United States*, supra; *Johnson* v. *United States*, 207 F.2d 314, 320 (5th Cir.), cert. denied 347 U.S. 938 (1953).

COUNT TWENTY-ONE

This count charged that all three appellants, on or about January 30, 1968, did knowingly and willfully place and cause to be placed in the mails an unregistered security, to wit, a promissory note issued by Diversified to Sharon and/or Dolores Fowler, in the amount of $9,200 to be delivered to Sharon Fowler in Belleville, Illinois, in violation of § 5(a)(2) of the Securities Act of 1933 (Title 15 U.S.C. § 77e(a)(2)).

Smallwood and Lay contend that there was insufficient evidence to establish that the mailing of the promissory note was willful and with criminal intent. Appellant Conell contends the government failed to prove that he willfully and knowingly committed the offense. Additionally, he asserts he did not participate in the Fowler transaction, had no direct knowledge of it and therefore 18 U.S.C. § 2, commonly known as the Aider and Abettor Statute, cannot properly be invoked to sustain his conviction.

We find the contentions of the appellants lacking in substance and reject them.

At the outset, it is appropriate to note that as a prerequisite to a conviction under Count Twenty-one, the government was required to prove that a security unregistered with the Securities and Exchange Commission was

carried or caused to be carried through the mails. *Kistner* v. *United States,* 332 F.2d 978, 981 (8th Cir. 1964). It stands undisputed that the Fowler note was executed in the principal amount of $9,200 on January 19, 1968. The note was signed by Diversified Brokers Company, Donald Smallwood, President. According to its terms, it matured on January 17, 1969 and bore interest at the rate of 100%. It was not registered. The evidence also conclusively shows that the note was placed in the mails by Diversified and was received by the payees.

Criminal intent and guilty knowledge relate to the condition of the mind. Ordinarily, of course, one who engages in conduct of a character similar to that presented by this record, does not proclaim his intent to defraud innocent victims. Since the condition of the mind is rarely susceptible of direct proof, recourse must be had to all pertinent circumstances. *Leffler* v. *United States,* 409 F.2d 44, 50 (8th Cir. 1969); *Anderson* v. *United States,* 406 F.2d 529, 532 (8th Cir. 1969); *Jackson* v. *United States,* 330 F.2d 679, 681 (8th Cir.), cert. denied 379 U.S. 855 (1964). Here we find overwhelming evidence which fully warranted the jury's implicit finding of criminal intent and knowledge.

Appellant Conell seizes upon the fact that the jury acquitted him of all of the other counts,[4] and submits that having been exonerated of implication in the scheme, his conviction under Count Twenty-one cannot be sustained.

The weakness of Conell's argument is that the case was properly submitted to the jury on a valid theory in connection with Count Twenty-one. The court, in accordance

---

[4] A canvass of the voluminous record of the seven days of trial leaves us with the firm conviction that there was ample evidence which would have warranted the jury in finding Conell guilty of all of the submitted counts. The evidence will be discussed in more detail, infra.

with 18 U.S.C. § 2, instructed the jury that whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is a principal and is legally responsible. Conell, anticipating that the government would rely upon the "Aider and Abettor" Statute, argues in his brief that the statute is wholly irrelevant because he was acquitted of participation in the unlawful scheme. Thus, appellant would have us blind ourselves to all of the evidence, except that which was focused upon the Fowler transaction. This approach is untenable. The question whether Conell aided and abetted in the mailing of the unregistered security necessarily requires us to consider and appraise all of the evidence which has relevance to that issue. And, of course, the evidence must be viewed in the light most favorable to the verdict of guilt on Count Twenty-one.

A brief resume of all of the evidence will serve to place Conell's involvement in Count Twenty-one in proper perspective. He associated himself with Diversified at approximately the same time it was incorporated and shortly thereafter he devoted full time to his official duties. Although he was not one of the original incorporators or a director of the company, he was designated as its Treasurer and knowingly was appointed to and held the office of Executive Secretary. In connection with his official duties, he was furnished and occupied a separate office in the company's headquarters in St. Louis, Missouri. His primary function, in his own words was to "raise funds for the company." This entailed obtaining, selecting and supervising representatives in various states to solicit funds for Diversified. Conell has been an active member in the Pentecostal Church of God for a number of years. Many ministers of that faith favorably known to Conell were induced by him to invest their funds and to engage as representatives under Conell's supervision in obtaining other investors. In each instance, the investor received a

promissory note of Diversified, some of them being signed by Conell who had authority to act in that capacity.

In October of 1966, Conell attended a church convention in the State of Ohio. He was afforded the opportunity to address the delegates for the purpose of persuading them to loan their money to Diversified and to become soliciting representatives for the company. He made numerous representations to different prospective investors for the purpose of lulling them into believing that Diversified was operating a legitimate business at a profit, and that the investors' funds would not only be secure but that a high rate of interest would be paid thereon. He informed one individual who invested $23,000 that he, Conell, was "worth about $5,000,000", and left the definite impression that he had become wealthy through his connections with Diversified. Conell informed a minister who invested $8,000 that he knew "85 to 90% of what the company was doing." He approved and signed statements of account of Diversified which were mailed to representatives engaged in seeking investors and knew that the statements were prepared for the purpose of securing funds for the company. And he was fully aware that the statements and notes issued by Diversified were sent through the United States mails from time to time.

Additional review of the evidence pertaining to Conell's authority and his admitted activities would unduly prolong this opinion. We conclude this aspect of his aiding and abetting in the commission of the Count Twenty-one offense by observing that his efforts for Diversified were fruitful. According to his testimony, he personally raised "$150,000, maybe $200,000". This, of course, does not include the amount Diversified acquired through representatives under Conell's supervision.

The other face of the coin deals with the benefits Conell unjustly reaped. Although the amount that he received

from Diversified which had been mulched from a countless number of investors is not comparable to the staggering amounts wrongfully appropriated by Smallwood and Lay, it is undisputed that Conell received approximately $80,000 during the relatively short existence of the company by way of bonuses, automobiles, overriding commissions, a so called loan to enable him to purchase a $40,000 home, and other items.

In light of the foregoing facts and a large quantity of other relevant evidence which we have not detailed, we are not persuaded to hold that the evidence was insufficient as a matter of law to show that Conell was an aider and abettor within the meaning of 18 U.S.C. § 2. See *Pereira* v. *United States*, 347 U.S. 1 (1954); *Nye & Nissen* v. *United States*, 336 U.S. 613 (1949); *Peterson* v. *United States*, 405 F.2d 102 (8th Cir. 1968), cert. denied 395 U.S. 938 (1969); *White* v. *United States*, 366 F.2d 474 (10th Cir. 1966). We hold this was a jury question.

It appears to us that the most that can be said of Conell's case is that there was an inconsistency in the jury's verdict. Although he does not expressly make such an assertion, that argument is implicit in his contention that his conviction cannot stand because of his acquittal on all other counts. But it has long been settled that consistency in the verdict is not necessary. In *Dunn* v. *United States*, 284 U.S. 390, 393 (1932), Mr. Justice Holmes wrote:

> "'The most that can be said in such cases is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt. We interpret the acquittal as no more than their assumption of a power which they had no right to exercise, but to which they were disposed through lenity.'"

We have recognized and applied the same principle. *Canaday* v. *United States*, 354 F.2d 849, 855-56 (8th Cir. 1966); *Schaefer* v. *United States*, 265 F.2d 750, 754-55 (8th Cir.) cert. denied 361 U.S. 844 (1959).

SENTENCES

Finally, appellants Smallwood and Lay suggest that the district court abused its discretion in imposing a sentence of 35 years and 20 years on Smallwood and Lay, respectively, and in assessing a $15,000 fine against each. These appellants concede, as they must, that the prison terms are well within the maximum that could have been imposed,[5] but invite our attention to the case of *United States* v. *West Coast News Co.*, 357 F.2d 855 (6th Cir. 1966), reversed on other grounds *sub nom Aday* v. *United States*, 388 U.S. 447 (1967). We have considered *West Coast*, where the court affirmed, but suggested that it was within the power of the district court under Rule 35, Fed. R. Crim. P., to reduce the prison sentences imposed. We are not inclined to suggest to the district court in this case the obvious, to-wit, that appellants have the right upon filing of the mandate to file a Rule 35 motion.

It is well established that an appellate court will not disturb a sentence within the statutory limit which the district court imposed in the exercise of its discretionary power. Our court has taken a consistent approach on review of sentences. *United States* v. *Dennison*, 437 F.2d 439, 440 (8th Cir. 1971); *Jones* v. *United States*, 396 F.2d 66, 69 (8th Cir. 1968), cert. denied 393 U.S. 1057 (1969) and cases there cited.

There is some disparity in the sentences imposed upon Smallwood and Lay but again, the difference in the treat-

---

[5] Smallwood and Lay could have received a total of 75 years in prison and fines totalling $47,000.

ment accorded these two appellants was within the discretion of the district court. Judge Harper, being fully aware that appellant Smallwood was the "prime mover" in the operations of Diversified, imposed a heavier sentence upon him. Although Lay was deeply involved, he was not the ring leader of the scheme and consequently received a lighter sentence.

We recognize that the sentences imposed upon Smallwood and Lay are severe. But we are also mindful, as was the district court, that the hardship and suffering endured by thousands of unsuspecting individuals, including many elderly persons, as the result of the nefarious operations of Smallwood and Lay, was also severe.[6]

By way of summary, the record convinces us that all of the appellants received a fair trial. They were represented by retained counsel, who demonstrated their competence in defending the charges. The evidence of guilt was overwhelming; no errors of law affecting the substantial rights of the appellants occurred. Therefore, the judgments of conviction should be and are affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

---

[6] Judge Harper, the seasoned trial judge, stated during the sentencing proceeding that during his tenure of 22 years on the bench, he had tried many mail fraud and SEC cases and that "without question this is the most vicious one that I have ever tried."

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-74

HAROLD F. CONELL, PETITIONER

v.

UNITED STATES OF AMERICA

No. 71-75

DONALD P. SMALLWOOD AND ROY E. LAY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 14, 1971. The petitions for certiorari in each case were filed on July 13, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the rights of petitioners Smallwood and Lay were violated when the receiver of a corporation formerly controlled by petitioners surrendered records in his custody in response to a grand jury subpoena duces tecum (raised in No. 71-75).

2. Whether evidence presented by an accountant for the bankrupt corporation was properly admitted (raised in No. 71-75).

3. Whether the evidence sustained the conviction of petitioner Conell for aiding and abetting the mailing of an unregistered security (raised in No. 71-74).

STATUTES INVOLVED

18 U.S.C. 2 provides:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Section 5(a)(2) of the Securities Act of 1933 (15 U.S.C. 77e(a)(2)) provides:

Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

* * * * *

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

STATEMENT

After a trial by jury in the United States District Court for the Eastern District of Missouri, petitioners Smallwood and Lay were convicted on seven counts of securities fraud, in violation of 18 U.S.C. 77q(a), seven counts of mail fraud, in violation of 18 U.S.C. 1341, and one count of mailing an unregistered security, in violation of 15 U.S.C. 77e(a)(2). Petitioner Conell, similarly charged under the same indictment, was convicted only of aiding and abetting the mailing of an unregistered security, in violation of 15 U.S.C. 77e(a)(2). The trial judge, noting that thousands of persons, including many elderly individuals, had suffered from petitioners' scheme, commented during the sentencing proceeding that this was the "most vicious" securities fraud he had ever seen (Con. Pet. App. 17). Smallwood was sentenced to imprisonment totaling 35 years and an aggregate fine of $15,000; Lay to imprisonment totaling 20 years and an aggregate fine of $15,000; Conell to imprisonment for five years and a fine of $5,000

(App. 9-11, 12-33).[1] The court of appeals affirmed.

As set forth in the opinion below,[2] Smallwood, Lay, and Conell at all relevant times were the president, secretary and treasurer of Diversified Brokers, a Missouri corporation. This company sold its promissory notes to investors, promising rates of return up to 100% per annum. Petitioners falsely represented that each investment was assigned to a specific numbered project for buying and reselling government surplus and distressed merchandise when, in fact, only a small percentage was so invested. The balance was diverted to large personal expenditures of the petitioners, eventuating in the bankruptcy of the company (S. & L. Pet. App. 2-3).

ARGUMENT

1. On February 17, 1969, the Securities and Exchange Commission filed a complaint against Diversified and petitioners, charging violations of the Securities Act of 1933. Ten days later, petitioners consented to a final judgment enjoining Diversified from violating the Securities Act and appointing a receiver to take charge of its property and assets (S. & L. Pet. App. 4). Pursuant to this judgment, the re-

---

[1] "App." refers to the appendix in the court of appeals on file with the Court; "S. & L. Pet." to the petition for certiorari of Smallwood and Lay; and "Con.Pet." to the Conell petition.

[2] Petitioners Smallwood and Lay (No. 71-75) adopt the statement of facts of the court of appeals, to which they make brief additions (S. & L. Pet. 3). Petitioner Conell does not specifically adopt this statement, but does not question its accuracy.

ceiver took charge of the office of Diversified, changing the locks and posting a guard (App. 38-42). On March 19, the receiver was served with a grand jury subpoena duces tecum for all the records of Diversified. He complied with the subpoena after he had requested and obtained additional records from Satz and Ponfil, attorneys for Diversified and petitioners. Petitioners were not present either at the time that Satz and Ponfil turned over records to the receiver or when the receiver turned over the records to the postal inspectors for delivery to the grand jury (App. 44, 118-122).

On July 1, 1969, petitioners Smallwood and Lay, through their present attorneys, filed a second supplemental motion to suppress Files 1 to 20, which were a part of the grand jury exhibits. The bulk of these files came from the records turned over by Satz and Ponfil at the request of the receiver. They showed transactions relating to real estate, motor cars, jewelry, boats, etc. (App. 62-69, 120-121). An accountant for the Securities and Exchange Commission testified that the items shown were all purchased from assets of Diversified, with the exception of the 1968 Cadillac Fleetwood shown in File 5 (App. 125-146). The court held that there was no proof that the records were personal. The motion to suppress was accordingly denied except with respect to File No. 5.

Contrary to the contention of these petitioners, their attorneys had no choice but to yield these records to the receiver. By the judgment appointing the receiver, to which they had consented, all property, assets and records of the company were *in custodia*

legis. Booth v. *Clark*, 17 How. 322, 331; *Taylor* v. *Sternberg*, 293 U.S. 470, 472. Had the attorneys chosen to resist the demand of the receiver they would have been in contempt. Cf. *Wiswall* v. *Sampson*, 14 How. 52, 64; *United States* v. *Maragas*, 390 F.2d 88 (C.A. 6). The factual finding below that these were corporate records was based on uncontradicted evidence. Thus petitioners had no right under the Fourth Amendment with respect to these papers, which were not theirs and which were not in their custody or possession. The right against self-incrimination under the Fifth Amendment has no applicability to corporate records. *Hale* v. *Henkel*, 201 U.S. 43, *Wilson* v. *United States*, 221 U.S. 361.[3]

2. Without citation to the record, petitioners Smallwood and Lay make a vague claim of error as to the admission of testimony by a certified public accountant concerning the exact amount of loss to the company which the accountant admitted was inaccurate because no physical inventory had been taken (S. & L. Pet. 6-7). The accountant referred to was Herbert A. Graham, retained by Smallwood in January 1969 to prepare income tax returns for Diversified (App. 359-360). Testifying for the government, Graham stated that he and his assistants determined the total loss of the company for the three-year period

[3] *Mancusi* v. *DeForte*, 392 U.S. 364, upon which petitioners Smallwood and Lay place principal reliance, does not touch upon the right of a court to custody of property in receivership. For this reason and for other reasons fully covered by the court below (S.&L Pet.App. 6-7), *Mancusi* is clearly distinguishable.

ending September 30, 1968, as $1,846,857.92. In reaching these figures, he accepted the oral information given to him by Smallwood as to the markup which would be made on the merchandise. He several times made unsuccessful requests to Smallwood for a physical inventory of the merchandise, but since this was not done, he could not say that his loss figures were correct (App. 370-372, 376-377). The criticism of this testimony and the exhibits introduced in connection therewith goes to its weight rather than to its admissibility. Especially since it was petitioner Smallwood who refused the requested physical inventory, the trial court properly exercised its discretion in admitting the summarizing exhibits, prepared under the supervision of this witness. *Boston Securities, Inc.* v. *United Bonding Insurance Co.*, 441 F.2d 1302 (C.A. 8); *Koolish* v. *United States*, 340 F.2d 513, 533 (C.A. 8), certiorari denied, 381 U.S. 951. In any event, lack of complete accuracy in ascertaining the amount of loss suffered by the company is of no significance here, in view of the enormous personal expenditures by these two petitioners, rendering the corporation hopelessly insolvent.[4]

3. The evidence fully sustained Conell's conviction on Count 21, which charged all three petitioners with placing and causing to be placed in the mails an unregistered security, a promissory note of Diversified to a Mr. and Mrs. Sharron Fowler in the amount of

---

[4] The opinion of the court of appeals stated that these petitioners had spent $263,639.63 at one jewelry store and $884,239.89 for antiques, jewelry and other items at another store (S.&L. Pet.App. 3, n.2).

$9,200, payable in one year, with 100% interest (App. 32-33, 495). While Conell was not specifically shown actively to have participated in this particular transaction, the evidence showed him to be a principal actor in promoting the work of the company, of which this transaction was an integral part. He associated himself with Diversified at approximately the time it was incorporated and became its Treasurer and Executive Secretary, occupying a separate office at the company headquarters in St. Louis. His primary function was to raise funds for the company. He selected and supervised representatives in various states to solicit funds, dealing extensively with ministers and members of the Pentecostal Church, of which he was a member. At a church convention in 1966, Conell told one minister that he knew 85% to 90% of what the company was doing. He claimed to have raised through his individual efforts $150,000 to $200,000 for the company. Although his emoluments from the company were not on a level with those of the other two petitioners, he personally received from the company approximately $80,000 in bonuses, automobiles, overriding commissions, and an unsecured loan to purchase a $40,000 home (Con. Pet. App. 13-15). This evidence adequately showed that he was fully aware of the fraudulent aspects of the venture, and actively furthered them. *Nye & Nissen* v. *United States*, 336 U.S. 613, 619; *Pereira* v. *United States*, 347 U.S. 1, 8-10. It is of no significance that Conell was acquitted on the other counts, since consistency in the verdict is not necessary. *Dunn* v. *United States*, 284 U.S. 390, 393.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
KIRBY W. PATTERSON,
Attorneys.

AUGUST 1971.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1971 441251 105